No. 12769

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CLARENCE C. CAMINOS,
Appellant,

vs.

TERRITORY OF HAWAII,
Appellee

Upon Appeal from the Supreme Court of the Territory of Hawaii

TERRITORY'S ANSWERING BRIEF

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SUMMARY OF ARGUMENT

I.

The Supreme Court of the Territory of Hawaii Did Not Err in Holding That Evidence of Alleged Separate and Independent Crimes of Bribery and Attempted Bribery Was Admissible.

A. EVIDENCE OF OTHER BRIBE PAYMENTS WAS INTRODUCED BY THE APPELLANT DURING THE CROSS-EXAMINATION OF WILLIAM CLARK.

The subject of similar and independent bribe payments, as disclosed by the record herein, was first introduced by appellant during the cross-examination of the prosecution's witness, William Clark. Therefore, the Territory of Hawaii was privileged to question Clark upon his redirect examination concerning such other bribe payments.

3 Wharton's Criminal Evidence (11th ed.) Sec. 1335, pp. 2213, 2214, 2215.

B. EVIDENCE OF SIMILAR AND INDEPENDENT OFFENSES IS RELEVANT TO SHOW SPECIFIC INTENT.

Under the Territorial bribery statute the prosecution was required to establish that the defendant had corruptly accepted bribe payments. The appellant contends that the introduction of evidence of other acts of accepting bribes was relevant to the issue of intent.

Revised Laws of Hawaii 1945, Sec. 11071.
Tedesco v. United States (9 C.C.A. 1941) 118 F. (2d) 737, 740.
Fall v. United States, 49 F. (2d) 506 (1931).
People v. Johnston, 43 N.W. (2d) 334, 339 (1950).
Territory v. Chong Pang Yet, 27 Haw. 693, 695 (1924).
Territory v. Awana, 28 Haw. 546, 547, 548 (1925).

C. EVIDENCE OF SIMILAR AND INDEPENDENT OFFENSES IS RELEVANT TO SHOW A GENERAL PLAN.

An exception to the general rule of criminal evidence which excludes evidence of other crimes, permits the use of evidence of similar and independent offenses to show a general plan, system or scheme.

Underhill's Criminal Evidence, Sec. 187, p. 344, 4th ed. (Niblack).
II Wigmore on Evidence, 3rd Ed., Sec. 343, p. 247.
People v. Duffy, 212 N.Y. 57, 105 N.E. 839, (L914) L.R.A. 1915 B 103, Ann. Cases, 1915 D. 176.
State v. Sweeney, 180 Minn. 450, 231 N.W. 225, 73 A.L.R. 380 (1930).

Taylor v. State, 174 Ga. 52, 162 S.E. 504, (1932).
Territory v. Abellana, 38 Haw. 532 (1950).

D. THAT THE TESTIMONY OF LOO, MIKAMI, TANITOG AND PRIOPIOS WAS PROPER REBUTTAL EVIDENCE.

Under the rule of *Territory v. Izumi,* 34 Haw. 209, (1937), the Territory of Hawaii had the right to refute material statements made by the defendant during his direct examination. Also, the Territory was privileged to rebut collateral material which the defendant introduced on direct examination.

II.

The Supreme Court of the Territory of Hawaii Did Not Err in Holding That the Trial Court Properly Denied Defendant's Motion for a Directed Verdict.

The record herein shows that no variance existed between the proof and the allegations of the two indictments.

State v. Sweeney, 180 Minn. 450, 231 N.W. 225.
Commonwealth v. Connally, 308 Mass. 481, 33 N.E. (2d) 303 1941.

III.

The Supreme Court of the Territory of Hawaii Did Not Err in Holding That There Was No Prejudicial Misconduct on the Part of the Trial Judge.

The trial of the present case was properly presided over by the trial judge according to principles specified under Territorial law.

Revised Laws of Hawaii, 1945, Sec. 10118.
23 Corpus Juris Secundum, Sec. 989.
United States v. Cotter, 60 F. (2d) 689.

IV.

The Supreme Court of the Territory of Hawaii Did Not Err in Holding That the Defendant's Assignment of Error in Regard to Certain Instructions Was Without Merit.

The trial court in an instruction requested by the appellant, adequately charged the jury on the law applicable to character evidence.

Terr. v. Marks, 25 Haw. 219 (1919).
Terr. v. Martins, 28 Haw. 187 (1925).
Instruction— 25 H. 219 Key A.L. 829, 28 H. 187.

V.

The Supreme Court of the Territory of Hawaii Did Not Err in Sustaining the Ruling of the Lower Court Overruling the Objection of the Defendant to the Giving of Certain Instruction Assigned as Error Under Specification of Error No. 5.

Authorities in various jurisdictions are uniform in sustaining the validity of such an instruction as set forth under Appellant's Specification of Error No. 5.

Territory v. Truslow, 27 Haw. 109 (1923).
Territory v. Wong, 30 Haw. 819 (1929).
Territory v. Young, 32 Haw. 628 (1933).
Territory v. Abellana, 38 Haw. 533 (1950).
Allen v. United States, 164 U.S. 492 (1896).

They are also in accord with the general principle of law upon which the legality of the aforementioned instruction is founded.

Lindsey v. U.S., 264 Fed. 94 (1920).
Waller v. U.S., 179 U.S. 810 (1910).
Wilson v. U.S., 162 U.S. 613, 40 L.Ed. 1090, 16 Sup. Ct. 895 (1896).

Commonwealth v. Spezzaro, 250 Mass. 454, 146 N.E. 3 (1925).
People v. Arnold, 43 Mich. 303, 5 N.W. 385 (1880).
Commonwealth v. Devaney, 182 Mass. 33, 64 N.E. 402 (1902).

ARGUMENT

I.

The Supreme Court of the Territory of Hawaii Did Not Err in Holding That Evidence of Alleged Separate and Independent Crimes of Bribery and Attempted Bribery Was Admissible.

A. EVIDENCE OF OTHER BRIBE PAYMENTS WAS INTRODUCED BY THE APPELLANT DURING THE CROSS-EXAMINATION OF WILLIAM CLARK.

Police Sergeant William Clark, who served with appellant on the Honolulu Police Department vice squad in 1945, testified as a witness for the Territory. During Clark's cross-examination, the subject of bribe payments that had been received by Clark from sources other than Paul Au, was developed by the defense. The record reveals a portion of William Clark's cross-examination, as follows:

"Q. Were you getting money from anybody else?
A. Yes.
Q. Who else? A. Fat Loo.
Q. What place did he run? A. Fan-tan.
Q. No; what place did he run?
A. Service Hotel.
Q. And I suppose that's all? A. No.
Q. Anybody else? A. Western Rooms.
Q. Western Rooms, who is that?
A. That's Small Snake.

Q. How much you got from Small Snake?
A. During 1945?
Q. Yes.
A. Oh, I collected $700.00 from him; I get $250.00 and the Captain gets $250.00, and the other $200.00 goes to the boys, $50.00 apiece.
Q. So you get $250.00 a week, your 'take'?
A. That's right.
Q. That give you about a thousand dollars a month?
A. That's right.
Q. So from Small Snake you got $12,000.00 that year? A. That's right.
Q. Did you get any bonus from him?
A. No.
Q. Did you spend any of that $12,000.00?
A. No, I don't think so.
Q. So, you add the twelve thousand to your twenty-nine thousand, you get forty-one thousand that year, that's from Paul Au and Small Snake Lee, correct? A. Yes.
Q. Who was the other man? A. Fat Loo.
Q. Was it a big outfit like Paul Au?
A. Yes, big like Small Snake, $700.00 a month.
Q. So you get the same thing from Fat Loo?
A. That's right.
Q. And that $12,000.00 was in the safe deposit box? A. Yes.
&. That gives you for that year 1945 $53,000.00, is that right? A. I think so.
Q. Any other money you made that year?
A. Yes, D. C. Chang.
Q. Was he a big outfit?
A. No; he give me in a package of cigarettes, $70.00 wrapped up in a package of cigarettes;

that $70.00 goes to each of my boys working under me, and I had only $250.00.

Q. That $70.00 and that $250.00, of that total sum how much you get?

A. I get $250.00 of that; each of the boys gets $70.00 wrapped in cigarettes.

Q. So from D. C. Chang you get also $12,000.00 a year, $250.00 a week? A. That's right." (T. 78-80.)

The above cross-examination of William Clark not only revealed that he was receiving bribe payments from other gamblers besides Paul Au, it established the further fact that defendant Caminos, like Clark, was also receiving regular bribe payments from Paul Au and from other Honolulu gamblers.

The defendant's participation in weekly bribe payments from Honolulu gamblers was further developed on redirect examination of Clark as follows:

"Q. Now in connection with your payments from these other gambling establishments, you stated that you collected from D. C. Chang $250.00 a week during the year 1945, for yourself?

A. Yes, sir.

Q. Now, how much did you get from Small Snake?

A. I collected $700.00 from Small Snake through Fat Loo.

Q. And what did you do with that $700.00?

A. Of that $700.00 I gave each of the boys $50.00, leaving $500.00, and I told the Captain that I give him—I offered him $300.00 and I'll take $200, and the Captain told me

to split the difference, that he'll have $250 and I'll have $250.

Q. So the payment you received from Small Snake of $700, out of that you kept $250 and $250 went to Captain Caminos?

A. That's right.

Q. Now, how about the payments—and what were those payments for?

A. Those payments were for the protection of that gambling game.

Q. How about Fat Loo, did he run a gambling game during 1945?

A. Yes.

Q. And how much did he pay you? (52)

A. $700.00.

Q. And what did you do with that money?

A. $50.00 for each of the boys that were working under me, $250.00 went to the Captain, and I got $250.00.

Q. Do you know a character by the name of 'Hot Dog'?

A. I do.

Q. Was he operating a gambling joint during 1945?

A. He operated it the latter part of 1945; he wasn't one of the first fellows that started.

Q. And did he make any payments?

A. Yes, he paid $500.00 a week.

Q. What became of that money?

A. Each of the boys had $50.00 apiece, that's $200.00; with $300.00 left, Captain Caminos got $150.00 and I got $150.00." (T. 80-82.)

We submit that when the subject matter of other bribe payments was introduced by appellant during the cross-examination of William Clark, the Territory was

privileged to explore such payments fully on Clark's redirect examination.

The scope and extent of redirect examination are matters that are within the discretion of the trial court, and there is no predication of error unless this discretion is abused.

> *3 Wharton's Criminal Evidence 11th ed. Sec. 1335, pp. 2213, 2214, 2215. Also, Abbott's Criminal Practice, 4th ed. Sec. 321, pp. 606, 607.*

Professor Wharton states the scope of redirect examination as follows:

> "The witness may be asked questions tending to clarify or modify statements brought out on cross-examination or to explain matters brought out in such cross-examination about which he had not testified on direct examination, or to rebut or avoid the effect of such new matters. But the court may, in its discretion, allow the introduction of further evidence in redirect examination, and may properly permit counsel to ask a question on redirect examination which he had omitted to ask upon the examination in chief. Indeed, the cross-examination of a witness may open the door for the admission on redirect examination of matters tending to support the case, which would not have been admissible on the case in chief."
> *3 Wharton's Criminal Evidence, (supra) p. 2214.*

B. EVIDENCE OF SIMILAR AND INDEPENDENT OFFENSES IS RELEVANT TO SHOW SPECIFIC INTENT.

A well-recognized exception to the general rule of

criminal evidence that proof of a separate and independent offense is inadmissible, is that where the intent of the accused is a matter in issue, evidence may be introduced of other acts and doings of the accused to establish intent.

Tedesco v. United States (9 C.C.A. 1941) 118 F. (2d) 737, 740.
Fall v. United States, 49 F. (2d) 506 (1931).
People v. Johnston, 43 N.W. (2d) 334, 339 (1950).
Territory v. Chong Pang Yet, 27 Haw. 693, 695 (1924).
Territory v. Awana, 28 Haw. 546, 547, 548 (1925).

In *Tedesco v. United States (supra),* the United States Court of Appeals for the Ninth Circuit in stating the exception to the general rule, cited the case of *Wood v. United States,* 41 U.S. 342, 360, 16 Pet. 342, 360 10 L. Ed. 987, and quoted Mr. Justice Story, as follows:

> ". . . where the intent of the party is matter in issue, it has always been deemed allowable, as well in criminal as in civil cases, to introduce evidence of other acts and doings of the party of a kindred character, in order to illustrate or establish his intent or motive in the particular act directly in judgment."

In *Territory v. Awana (supra),* the defendant was convicted of the crime of embezzlement. At the trial, evidence of similar offenses was introduced to establish criminal intent. The Hawaiian Supreme Court held that,

> "Evidences of other crimes similar to that charged is relevant and admissible when it shows or tends to show a particular criminal intent which is necessary to constitute the crime charged. That this evidence incidentally proves independent crime is immaterial."

The case of *Territory v. Chong Pang Yet, (supra)*, concerned the crime of fraudulently drawing on a bank. During the trial, the prosecution introduced evidence of other offenses to prove criminal intent. The Territorial Supreme Court held as follows:

> "It is the general rule that, on a prosecution for a particular offense, evidence which shows or tends to show that the accused has committed another offense wholly independent of that for which he is on trial, even though it is an offense of the same sort, is irrelevant and inadmissible. (16 C.J. p. 586.) There are, however, numerous exceptions to this rule, one of which is that, where it is necessary to show a particular criminal intent as constituting an ingredient factor of the offense charged, evidence of other offenses similar to that charged is admissible."

The United States Court of Appeals for the Sixth Circuit in *Crinnian v. United States*, 1 F. (2d) 643 and the United States Court of Appeals for the Second Circuit in *Harvey v. United States*, 2 Cir. 1928, 23 F. (2d) 561 support appellant's contention concerning the application of the intent exception. The distinguishing feature of *Kempe v. United States*, 151 F. (2d) 680,

688, also cited by the appellant, was stated by the court as follows:

> "The offenses of which the defendant was convicted are misdemeanors. Proof of specific criminal intent to commit such an offense is not essential, and the use of the word 'wilful' in sub-section 2 (a) (5) of 633, 50 U.S.C.A. Appendix, the Second War Powers Act of 1942, as amended, and in Section 925 (b), 50 U.S.C.A. Appendix, the Emergency Price Control Act of 1942, as amended, does not require proof of such specific intent on the part of a defendant charged with an offense under the Acts."

The essential elements of the present charge, as defined in Section 11071, Revised Laws of Hawaii, 1945, are: (1) civil officer who, (2) corruptly accepts, (3) gratuity, (4) under an agreement or with an understanding that he shall in the exercise of any function in his official capacity, (5) decide and act in a particular manner in any question or matter that may by law come before him.

It is submitted that under the statute, the Territory was required to prove an intent, to-wit, that defendant corruptly accepted bribe payments to have his decisions or actions influenced in matters pending before him in his official capacity as an officer of the Honolulu Police Department.

> *People v. Johnston,* 43 N. W. (2) 334, (Mich. 1950).

C. EVIDENCE OF SIMILAR AND INDEPENDENT OFFENSES IS RELEVANT TO SHOW A GENERAL PLAN.

Another well established exception to the general rule of criminal evidence which excludes evidence of other distinct and independent offenses is that evidence of other crimes is admissible to show a general plan.

Underhill's Criminal Evidence, Sec. 187 p. 344, 4th ed. (Niblack).
Wigmore on Evidence, 3rd Ed. II, Sec. 343, p. 247.
People v. Duffy, 212 N.Y. 57, 105 N.E. 839 (L914) L.R.A. 1915 B 103, Ann. Cases, 1915 D 176.
State v. Sweeney, 180 Minn. 450, 231 N.W. 225, 73 A.L.R. 380 (1930).
Taylor v. State, 174 Ga. 52, 162 S.E. 504, (1932).
Territory v. Abellana, 38 Haw. 532 (1950).

In *People v. Duffy, (supra),* a police sergeant was indicted and found guilty of receiving a bribe. The trial court admitted evidence of a collection of bills from gamblers who were not named in the indictment. The court stated in upholding the trial court that:

> "Measured by the tests of ordinary experience and common sense, there cannot be any doubt that this evidence that the defendant was collecting bribes of certain lawbreakers in his precinct in connection with the other supplementary evidence which was produced tended to establish a systematic plan for the collection of graft, which would naturally include Roth who, at the same time, in the same quarter, and under the same circumstances was pursuing the same kind of an unlawful business. Independent of any evidence it might naturally be believed that payment of 'hush money'

would not be enforced against only a part of known wrongdoers, but would be enforced from all similarly situated. But in this case the other evidence makes this connection quite inevitable. Defendant obtains a list of former bribe givers and announces a plan thenceforth to collect from them. The list includes the person named in the indictment and certain others. As already stated, their cases in respect of this matter are in all respects precisely similar. Thereafter it appears that he is making these collections from certain persons on the list, and the inference is surely permissible that the plan already outlined is not only in existence but in actual operation, and that it includes and foretells the collection for which defendant was indicted.

"The force and competency which reason and ordinary logic thus give to this evidence are, I think, fully sustained by the authorities." (citing authorities).

In *State v. Sweeney, (supra)*, a city alderman was indicted and convicted for receiving a bribe. The state submitted evidence of other briberies other than that which was charged in the indictment. The court in approving the admissibility of the above evidence stated as follows:

"We are here interested only in the last-mentioned exception. This exception rests upon system and involves a general and composite plan or scheme. Some connection between the crimes must be shown to have existed in fact and in the mind of the defendant, uniting them for the accomplishment of a common purpose before such evidence

can be received. This connection and such system was not shown in State v. Fitchette, 88 Minn. 145, 92 N.W. 527, upon which defendant herein places much reliance. The evidence in the Fitchette case did not bring it within any of the exceptions mentioned. That case was controlled by the general rule. The system was shown in this case. All these transactions were corrupt and were for the purpose of corruptly obtaining money through the abuse of a public trust. This was the common aim. Evidence of such other crimes is admissible, not to establish the other crimes, but as confirmation of the evidence tending to convict defendant of the crime for which he is on trial." (citing authorities).

In *Taylor v. State, (supra)*, a county clerk was indicted for bribery. In holding that similar briberies were admissible, the Georgia court said:

"The court did not err in admitting this evidence. While it related to other offenses than that for which the defendant was on trial, it was relevant as tending to show intent, and system and to illustrate, the methods and conduct of the defendant in reference to the particular acts of bribery for which he was on trial. 'In bribery cases, evidence of similar offenses is frequently admitted to show intent, a plan or scheme to commit a series of crimes including the one for which accused is being tried, or the intimate and apparently confidential relations between the informer and the defendant; but evidence of other offenses which are not of a similar nature or character, and which do not tend to prove the bribery charge, is not admissible.' 16 C.J. 595."

The appellant cites the case of *Territory v. Blackman,* 32 Haw. 460 (1932) and states in his opening brief on page 31 that the legal principle involved in the instant case was also present in the Blackman case. It is submitted that *Territory v. Blackman* is clearly distinguishable on its facts from the instant case. The Blackman case involved the doctrine of election in embezzlement cases, and the reason for requiring the prosecution to elect was stated by the court as follows, at page 473:

> "A compelling reason for requiring an election under the circumstances of this case is that it is impossible to determine from the verdict of the jury upon which transaction the defendants were found guilty. Some of the jurors may have concluded that in their dealings with the Aviation of Delaware stock on May 17 the defendants committed embezzlement and that this was the only embezzlement shown by the evidence. Others may have concluded that there was no embezzlement in that transaction but that the defendants had fraudulently converted Mrs. Lillie's credit balance, or a portion of it, on July 2 and were thus guilty of embezzlement. Such a verdict, lacking as it well may the essential element of unanimity, does not meet with the requirements of the law regarding a trial by jury and is insufficient to support a judgment of guilty."

The case of *Territory v. Abellana,* 38 Haw. 532 (1950), was decided by the Supreme Court of the Territory of Hawaii a month prior to its ruling in the instant case. We quote from the opinion of the court at page 537:

"To the established rule that evidence of other crimes wholly independent of that for which a defendant is on trial is inadmissible, are two equally well-defined exceptions: (1) That evidence of other crimes is competent to prove the specific crime charged if it tends to establish a common scheme, plan or system embracing the commission of two or more crimes so related to each other that proof of one tends to establish the other; and (2) when such evidence tends to aid in identifying the accused where his identity has not been definitely connected with the offense on trial.

"While the rule itself is fundamental and well settled by a long line of adjudication, it is equally fundamental and well settled that in certain classes of cases collateral offenses may be shown as reflecting upon the mental processes * * * of the accused * * * where such collateral offenses have been executed according to a plan or method * * *." *Whiteman v. State,* 119 Ohio 285, 290, 164 N.E. 51, 52.

Thus, when the instant case came before the Territorial Supreme Court of Hawaii, the court had before it, the recent decision of *Territory v. Abellana* which sustained the use of other crimes to establish a common scheme.

The evidence established the fact that Appellant Caminos during his tour of duty as Captain of the Vice Squad was receiving regular weekly payments of money for the protection of gambling games in the City of Honolulu.

D. THAT THE TESTIMONY OF LOO, MIKAMI, TANITOG AND PRIOPIOS WAS PROPER REBUTTAL EVIDENCE.

During the trial, appellant took the stand in his own behalf and on direct examination testified that he had never received bribe payments from anyone. After defendant rested his case, the prosecutor called in rebuttal the witnesses Rodenhurst, Lawrence Fat Loo, Mikami, Tanitog and Priopios. These five witnesses testified to gambling activities which directly involved Captain Caminos. (Op. Br. 22-30).

In *Territory v. Izumi,* 34, Haw. 209, (1937) the defendant on direct examination denied having had sexual relations with "any other pupil." The prosecution in rebuttal produced a witness to refute defendant's statement. The Supreme Court of the Territory of Hawaii ruled as follows:

> "The accused having elected to bring into the case a collateral issue it was clearly the right of the prosecution to refute, if it could, the defendant's testimony upon that issue. * * * Wharton correctly states the rule to be that 'Testimony about which a witness is to be impeached must be material and relevant. Since the answers of a witness given upon cross-examination on any irrelevant or collateral matter are conclusive and binding on the cross-examiner, such witness may not be contradicted or impeached upon an immaterial or collateral matter or issue about which he testified on cross-examination by the party seeking to impeach him, and especially not by the admission of substantive evidence. This limitation, however, applies only to answers on cross-examination. It does not affect answers on the examina-

> tion in chief. If, therefore, the irrelevant matter is given on direct examination the witness may be contradicted on it.' (3 Wharton's Criminal Evidence (11th ed.), sec. 1353.)"

It is respectfully submitted that evidence of a system of collecting bribes from certain Honolulu gamblers was introduced into the instant case by the appellant, himself, when he cross-examined the Territory's witness William Clark on the subject of pay-offs from gamblers other than Paul Au. The redirect examination of William Clark revealed that Caminos was receiving regular bribe payments from several Honolulu gamblers. The right of the Territory to re-examine Clark on the subject of other graft payments is sustained by the authorities. The vast majority of cases support the use of evidence of separate and independent offenses to establish, plan, design, or scheme.

It is further submitted that under the authority of *Territory v. Izumi,* the rebuttal evidence of the prosecution was properly admitted by the trial court.

II.

The Supreme Court of the Territory of Hawaii Did Not Err in Holding That the Trial Court Properly Denied Defendant's Motion for a Directed Verdict.

At the close of the Territory's case, defendant made a motion for a directed verdict on the ground of variance. Defendant contends that a variance exists between the allegations of the two indictments and the proof because the evidence showed that Appellant Caminos instead of receiving his regular share of bribe money

directly from Paul Au, was, in fact, receiving the money from Police Sergeant William Clark.

Appellant cites *State v. Sweeney, (supra)* in support of his contention that a variance exists between the proof and the indictments. However, in the Sweeney case the Supreme Court of Minnesota in ruling that there was not a variance between the proof and the indictment stated as follows on page 227:

> "Defendant urges that the evidence shows that he and Maurer were accomplices in receiving an $810 bribe from the agent of the General Motors Corporation, and that there was a fatal variance between the indictment and the proof. This is upon the theory that the transaction of the agent was exclusively with Maurer, but that both Maurer and defendant were the joint beneficiaries of the $810, half of which it is asserted Maurer gave to defendant as a division of the spoils. Possibly the facts might have been so construed. The state construed the transaction differently and alleged that Maurer bribed defendant by giving him $405. The jury have found this to be the fact. The finding is not without support in the evidence which, among other things, shows that defendant expressly refused to deal with the agent. Defendant's corrupt intention and conduct rested exclusively upon his conduct with Maurer. The mutually cooperative corrupt arrangement was susceptible to the construction that one of the two men was to bribe the other, or vice versa, as occasion might arise. The finding is adverse to the contention of a variance."

In *Commonwealth v. Connally,* 308 Mass. 481, 33 N.E. (2d) 303 (1941), two indictments were returned against defendant, a former elected Clerk of the Superior Court of Suffolk County, Boston, charging him with bribery. The two indictments contained several counts, each count alleged that defendant Connally, "did corruptly request and accept from," a named person, a specified sum of money,

> "under an agreement and with the understanding that his, the said Connally's vote, opinion, judgment and decision should be given in a particular manner, and upon a particular side of a question, cause and proceeding which was then pending, and which might by law come and be brought before him, the said John P. Connally, in his official capacity" as such clerk and that in that capacity "he, the said John P. Connally, should make a particular nomination and appointment."
>
> *33 N.E. (2d) 303, 306.*

During the trial no evidence was offered to show that defendant Connally received any payment directly. The evidence revealed that William T. Conway received the payments and paid the campaign obligations of the defendant. Several witnesses testified that they had paid Conway money in return for job security. Concerning this evidence, the Supreme Judicial Court of Massachusetts stated as follows:

> "Assignments 4 to 15 inclusive, 19, and 31 attack the admission in evidence of dealings of the employees paying the bribes or their agents with Conway and Margaret W. Kennedy. The

objection is that the defendant was not present. But the case was tried on the theory Kennedy was a tool of Conway, and Conway the agent of the defendant, and further that the money paid went to the defendant. Sufficient evidence appeared, as has been shown, to support that theory. That made evidence of dealings with Kennedy and Conway competent. It is unimportant whether at the time the evidence of those dealings was admitted agency had been fully proved. It is sufficient that before the testimony was closed evidence to support that theory was in the case. The whole case could not be proved in one breath, and the order of proof of the different elements that in combination made up the case for the Commonwealth was within the control of the judge."

33 N.E. (2d) 303, 310.

It is respectfully submitted that since the evidence is clear that Police Sergeant William Clark, insofar as the appellant's share of bribe money was concerned, was merely a messenger boy, a conduit, collecting his share, and delivering Captain Caminos' share to him, no variance existed between proof and the indictments.

III.

The Supreme Court of the Territory of Hawaii Did Not Err in Holding That There Was No Prejudicial Misconduct on the Part of the Trial Judge.

The alleged misconduct of the trial judge is made the basis of appellant's third specification of error. Appellant complains that the presiding judge was guilty of prejudicial misconduct in that such judge did belittle, berate, deprecate, rebuke and lecture defense counsel

and accuse them of being unfair and untruthful. (Op. Br. p. 40).

Appellant has listed in his opening brief, (page 41), several statements which were uttered by the trial judge during the course of the trial. These statements appear on the printed page of appellant's brief, naked and stripped of any background. Thus, we submit, an examination of the record is in order.

In the court's attempt to get Mr. Patterson to make his objections in an orderly manner, the transcript reveals the following:

> "The Court: I suggest, Mr. Patterson, you do not interrupt the witness and make objection when his answer is unfinished; you're taking advantage of the witness, you're taking advantage of counsel, you're taking advantage of the Court; there's an orderly way to present an objection.
>
> "Mr. Patterson: Most respectfully, Your Honor—when this man says 'he gave me the impression' I can't figure that out ahead of time—I most respectfully except to the remarks of the Court and assign them as error, if Your Honor pleases.
>
> "The Court: Your objection is noted and the exception allowed. The Court requests you, in a very courteous tone of voice, Mr. Patterson, to please wait until the man has finished his answer; you'll be given an adequate hearing with your objections and the Court will make its ruling." (T. 144).

This statement by the court is listed as evidence of misconduct on the part of the presiding judge. (Op. Br. 41).

Appellant contends that the trial judge was guilty of prejudicial misconduct when he accused defense counsel of manufacturing evidence. From this, the appellant concludes that the trial judge charged defense counsel with being untruthful, "(inferentially, at least)." (Op. Br. 41).

The record reveals the following:

"The Court: (Interrupting): The Court will cut out the argument now in that fashion, Mr. Patterson. The sole question is one of law and not one of an argument to the Court on the credibility of witnesses; the question is one of law, whether you can manufacture opportunity for evidence by specifying names in a cross-examination on a collateral issue, that's the question of law involved. The Court will permit the one type of question from this witness and will lay the precedent if you have others of the same character, to simply ask the witness whether or not he received any division of the spoils from Mr. Clark on any occasion.

"Mr. Patterson: Thank you, Your Honor. Will you read that statement of His Honor's to me—

* * *

"The Court: Yes; let me give it through, Mr. Patterson. I'll caution the jury that the Court is permitting this testimony; we're not trying the issues of other collateral matters, whether they did or did not happen; we're trying simply the issue as to Mr. Caminos, and this issue is as to the credibility of Mr. Clark as addressed in this particular case. (110)

"Mr. Patterson: Can I get the first part of Your Honor's statement?

"The Court: Yes.

"Mr. Patterson: I wish to take exception and assign as error the remarks of the Court that I took advantage of an opportunity to manufacture evidence, as being prejudicial to the defendant in this case; I have not done that; I didn't even examine the witness Clark, Your Honor, I didn't even examine him so I couldn't be guilty of manufacturing evidence.

"The Court: Mr. Patterson, you are a member of the group of attorneys defending this case. The Court's remark was that the proposition of law before the Court was whether the defense could manufacture opportunity for additional witnesses on collateral matters by specifying on cross-examination names, and that it was a question of law that in connection with the transactions alleged to have emanated from Paul Au of the delivery of money to Mr. Clark that I am permitting you to ask this witness or any other witness that was named in that history whether or not he received any split of the spoils alleged to have been given." (T. 147-149).

We submit that the trial judge did not accuse defense counsel of manufacturing evidence. The record shows that the trial judge, at no time, accused defense counsel of being untruthful.

The trial judge is charged with having accused defense counsel of "deliberately violating rules of evidence." (Op. Br. 41). An examination of the record reveals no such accusation. The Court, in addressing Mr. Patterson, made the following statement:

"The Court: Mr. Patterson, the Court dislikes the the necessity to call your attention to the obvious

thing that you know, that any party putting on a witness who is obviously surprised by the answers given on the witness stand by reason of the fact that such party is bound by that witness' statements unless they desire to impeach him from former inconsistent statements, the law allows a party who is thus surprised to impeach his own witness under specific rules of the statute, to it, calling the witness' attention to the time and place of the supposed inconsistent statement, giving him an opportunity to be heard thereon, and if the witness does not clearly admit the giving of the former statement, that the party has the right to prove, if he can, from any witness, the giving of the former inconsistent statement, a rule which you've been, as an attorney for more than 30 years, conversant with and its applicability here; and the Court is giving this instruction openly in the presence of the jury by reason of the type of argument that you've just made openly, as though it were something being tried by the prosecution that's out of order; and the Court wants the record to show, and if the Court is in error to give you the benefit of the error, to correct the statement in (114) the presence of the jury, that the law is that a party may by proper showing impeach his own witness, if having produced him under the responsibility of vouching for his truth they are taken by surprise and desire to show to the jury that they are not satisfied with the present truth of the witness' answers given. Now you may have your exceptions to the Court's pronouncement of law in the presence of the jury on that issue." (T. 152-153).

The duty of the court as provided under Territorial law is as follows:

"It shall be the duty of the Court to control all proceedings during the trial, and to limit the introductions of evidence and the argument of counsel to relevant and material matters, with a view to the expeditious and effective ascertainment of the entire truth regarding the matters involved." *Section 10118, Revised Laws of Hawaii, 1945.*

The general rule on the subject of correcting and admonishing counsel is stated in *23 Corpus Juris Secundum, 340-342 Section 989,* as follows:

"While attorneys in a criminal prosecution are entitled to and must receive fair treatment at the hands of the trial court, as a general rule the court may, by words or conduct, properly caution, correct, advise, admonish, and, to a certain extent, criticize counsel during the case, provided it is done in such manner as not to subject counsel to contempt or ridicule, or to prejudice accused in the minds of the jurors; and it is the duty of the presiding judge to correct and check important and repeated errors of counsel. Accordingly, an admonition to the prosecuting attorney to examine witnesses carefully to avoid exceptions, or to counsel for accused to treat a witness respectfully, or to refrain from improperly interrupting the examination of witnesses, or to stay within the proper limits of cross-examination, is not error; but a remark or conduct by the judge conveying an unwarranted reprimand, or a severe criticism on the methods of, or discrimination against accused's counsel, or an attack upon the motives of counsel with respect to particular conduct during the trial, or a statement that he or the jury has been deceived by him, or a reprimand for mis-

> conduct in other cases, is improper. Manifestations of impatience by the court at the methods or requests of counsel are not only in bad taste but also may constitute error; but a remark that the cross-examination is unusually protracted is not improper where it is brought out by the fact that such cross-examination has been exceedingly prolix."

In *Territory v. Van Culin,* 36 Haw 153 (1942), the misconduct of the trial judge was based upon his assumption of the role of prosecutor. The record there revealed that the trial judge exhibited his bias and his unfriendly attitude towards the defendant when he asked defendant a total of sixty-eight questions.

The official report of *Grock v. United States,* 289 F. 544, reveals no facts of the trial court's misconduct. Similarly, no evidence of the trial judge's misconduct appears in the report of *Berger v. United States,* 295 U.S. 78, 55 S. Ct. 629, L. Ed. 1314.

In the case of *Lau Lee v. United States,* 67 F. (2d) 156, (1933), which is cited by the appellant, this court was also concerned with the conduct of Mr. Patterson and the resulting remarks of the presiding judge. The trial judge in the Lau Lee case, in the presence of the jury, accused Mr. Patterson of being untruthful, not honest and straightforward with the jury, and with having intentionally misled the jury. This court held that the statements of the trial judge were prejudicial.

Judge Wilbur, speaking for the court in *Lau Lee v. United States,* stated, at page 159:

> "On the other hand, the court has the right to correct erroneous or misleading statements made by the attorneys with reference to the evidence and resulting prejudice to the defendant must be borne by them . . ."

We submit that the Lau Lee case and the instant case are distinguishable on the facts. The trial judge in the present case made no comment, at any stage of the trial, that defense counsel were dishonest or that a bad motive existed.

Judge Learned Hand has succinctly phrased the role of the trial judge in the following statement:

> "Criminal prosecutions are not to test the trial judge's adeptness in answering questions of law, put to him in multitude, often in the heat of sharp dispute. Trials are to winnow the chaff from the wheat; when the accused has had fair opportunity to answer the charge; when it has been lawfully proved, and fair men have found him guilty, our duties end."
>
> *United States v. Cotter,* 60 F. (2d) 689 (C.C.A. 2d, 1932), at page 694.

IV.

The Supreme Court of the Territory of Hawaii Did Not Err in Holding That the Defendant's Assignment of Error in Regard to Certain Instructions Was Without Merit.

The fourth specification of error concerns the trial court's refusal to instruct the jury on the subject of character evidence as requested by the defendant. The three requested instructions of the defendant are as follows:

DEFENDANT'S INSTRUCTION NO. 23

"I instruct you that in this case the defendant Caminos has offered witnesses for the purpose of showing his good character. When he does so he puts his character in issue, and having done so the prosecution was at liberty, under the law, to bring witnesses before the court to show that the defendant was not a man of good character."

This instruction is listed on page 50 of transcript as having been refused.

DEFENDANT'S INSTRUCTION NO. 24

"I instruct you that the prosecution has not produced any witnesses in this court tending to show that the defendant Caminos is not a man of good character or reputation; and the testimony of certain witnesses for the prosecution that is in conflict with the testimony of the defendant is not to be considered by you as character evidence but only for the purpose of deciding the issue in this case as to whether or not the defendant is guilty under the evidence in accordance with the instructions that have been given and will be given to you by this court."

This requested instruction is also listed in the transcript on page 50 as having been refused by the trial court.

DEFENDANT'S INSTRUCTION NO. 27

"You are instructed that if you should find and believe that the prosecution failed to produce available evidence in this case, you are entitled to consider the failure of the prosecution to produce witnesses and such evidence in arriving at a ver-

dict in this case as to whether or not the defendant is guilty or not guilty."

The record shows that this instruction was "refused as argumentative." (T. 50).

The trial court charged the jury as requested in Defendant's Instruction No. 20 as follows:

> "The court instructs the jury that the defendant has introduced evidence before you tending to show his good character for honesty, truth and veracity. If, in the present case, the good character of the defendant for these qualities is proven to your satisfaction, it is to be considered by you in connection with the other facts in the case; and if after consideration of all the evidence in the case, including that bearing upon the good character of the defendant, the jury entertains a reasonable doubt as to defendant's guilt, then I charge you it is your duty to acquit him, and a further charge that good character itself may create a reasonable doubt and entitle the defendant to an acquital, even though without such proof of good character you would convict."

We submit that the above-quoted instruction sufficiently informed the jury of the effect of character evidence.

Terr. v. Marks, 25 Haw. 219, (1919).
Terr. v. Martins, 28 Haw. 187, (1925).

The use of evidence of other offenses, which the Territory contends, was injected into the case by the appellant himself, was never offered as evidence of the appellant's bad character. Such evidence was devel-

oped on the re-direct examination of Fat Loo when the matter of similar pay-offs was introduced in Fat Loo's cross-examination.

Professor Wigmore in discussing the use of other similar offenses distinguishes such use from the character rule, as follows:

> "*CRIMINALITY OF ACT IMMATERIAL; CHARACTER RULE, DISTINGUISHED.* It has already been noted (ante 216) that the criminality of prior acts thus offered does not affect their admissibility. Either they are relevant, by the above tests, or they are not; if they are not, they are rejected because they are irrelevant; if they are, they are received in spite of their criminality. The only bearing of the latter quality is that, if they are irrelevant, it furnishes another reason for excluding them, namely, the reason of Undue Prejudice, as enforced in the Character Rule (ante, 194); for these other criminal acts would not merely be irrelevant, but would go to evidence the defendant's character and career as bad and thus to create undue prejudice—a mode of argument against him that is forbidden by a fundamental principle.
>
> "It is, however, to this reluctance to violate the Character Rule that is due the strictness shown by the Courts in excluding prior criminal acts which do not strictly fulfill the rigorous tests just examined. If the admission of irrelevant evidence had been the only consequence of an error in the ruling, there would undoubtedly have been seen a greater liberality in the judicial application of the foregoing tests. The unsatisfactory result has been that, in this narrow and over-cautious

anxiety not to infringe upon the Character Rule, evidence highly appropriate to show Knowledge, Intent, or Design, and amply fulfilling the proper tests for that purpose, has often been excluded.

"Of the other objections (than Undue Prejudice) from the point of view of that auxiliary policy which creates the Character Rule (ante, 194), the objection of Unfair Surprise is the only one that could be supposed to be here applicable. But it has never been treated by the Courts as of consequence. This rational and practical conclusion is easily understood when it is remembered that any other conclusion might result in shutting out most of the appropriate evidence, of this and other sorts, to prove a crime. The legal objection of Unfair Surprise so far as it is ever recognized, is not founded on the notion that the opponent was not in fact anticipating this specific evidence (post, 1845, 1849), but on the notion that he could not have anticipated evidence which might easily be fabricated beyond detection; and the objection is recognized as having force only when the evidence offered is of a class capable of involving the entire range of the person's life. Evidence tending to show, not the defendant's entire career, but his specific knowledge, motive, design, and the other immediate matters leading up to and succeeding the crime, is of a class always to be anticipated and is in each given instance rarely a surprise; moreover, the kernel of the objection of unfair surprise, namely, the impossibility of exposing fabricated evidence, is wanting where the evidence deals with matters so closely connected with a crime as design, motive, and the like":

II Wigmore, Sec. 305, pp. 205, 206, 3rd ed.

We respectfully submit that the use of rebuttal witnesses became necessary when the defendant, as a witness in his own behalf, testified on direct examination that he never received bribes from Clark "or any other person." (Op. Br. 10).

V.

The Supreme Court of the Territory of Hawaii Did Not Err in Sustaining the Ruling of the Lower Court Overruling the Objection of the Defendant to the Giving of Certain Instruction Assigned as Error Under Specification of Error No. 5.

The instruction in question assigned as error under Specification of Error No. 5 reads:

> "The court further instructs you, gentlemen of the jury, that if you find from the evidence in this case beyond a reasonable doubt that the defense set up by the defendant is a false and fabricated defense and was purposely and intentionally invoked by the said defendant then you are instructed that such a false and fabricated defense forms the basis of a presumption against him because the law says that he who resorts to perjury to accomplish an end, this is against him and you may take such action as the basis of presumption of guilt." (See *Transcript of Record pp. 180-181*).

In dismissing the objection of the defendant to the giving of the above instruction, the Supreme Court of the Territory of Hawaii once again reaffirmed the long established precedent firmly embedded in the criminal jurisprudence of the Territory of Hawaii. The attitude of the Supreme Court in refusing to entertain

further hearing on the error assigned in Specification of Error No. 5 in effect confirms the legality of it.

In *Territory v. Truslow,* 27 Haw. 109 (1923), the Supreme Court of the Territory of Hawaii was confronted with the validity of the instruction for the first time. The instruction of the trial court as given to the jury over the objection of the defendant reads:

> "If you find from the evidence in this case beyond a reasonable doubt that the defense set up by the defendant Truslow is a false and fabricated one and if you further find that such false and fabricated defense was purposely and intentionally invoked by the defendant then you are instructed that such a false and fabricated defense forms the basis of a presumption against him because the law says that he who resorts to perjury to accomplish an end, this is against him and you take such action as the basis of a presumption of guilt."

In overruling the objection of the defendant to the giving of the above instruction to the jury, the Supreme Court through the majority opinion written by Chief Justice Peters said:

> "The facts testified to by the defendant and all the circumstances of the case tend to support the inference that the original authority of July, 1920, in respect to the sale of Branco's stock, had never been modified or revoked by Branco but was in full force and effect at the time that the defendant ordered the sale of the balance of the Olaa stock remaining unsold on April 11, 1921, and that the defense was a false and fabricated

one. If true, it would have been an absolutely good defense. The jury by its verdict stamped it as false. The defense was the product of the defendant. Its sole support was in the evidence of the defendant. This is not a case of mere conflict in the evidence. The defendant attempted by evidence extraneous to the main issue as developed by the prosecution to construct a defense to which he thought death had removed all likelihood of denial. As said by the court in *Beck v. State,* 80 Ala. 1: 'There is a principle of law, that if a fraud on the court be attempted, in the getting up of false testimony, or by any other artifice tending, or designed to deceive or mislead, or to make the false appear to be the true, and this is knowingly assisted, or procured to be done by the suitor, this is a circumstance which the jury may rightly consider, to the disadvantage of the party making or assisting in such attempt. An honest cause, the law considers, needs not the aid of such reprehensible methods. But, to justify the application of this principle, there must be some proof of it, or testimony of facts or circumstances, tending to support such inference. Mere conflict among witnesses examined on the opposing side, without more, does not and cannot raise such inquiry, or bring the principle referred to into play.' "

Territory v. Truslow, supra, at pp. 118-119. See *Territory v. Wong,* 30 Haw. 819, 828.

In *Territory v. Wong,* 30 Haw. 819 (1929), wherein the defendants were convicted of attempted bribery, one of the errors complained of was to the giving by the trial court over the objection of the defendant the following instruction:

"The court further instructs you, gentlemen of the jury, that if you find from the evidence in this case beyond a reasonable doubt that the defense set up by the defendant Solomon Wong, is a false and fabricated one and if you further find that such false and fabricated defense was purposely and intentionally invoked by the said defendant then you are instructed that such a false and fabricated defense forms the basis of a presumption against him because the law says that he who resorts to perjury to accomplish an end, this is against him and you take such action as the basis of a presumption of guilt."

As in the preceding case of *Territory v. Truslow, supra,* the Supreme Court of the Territory of Hawaii again sustained the ruling of the trial court overruling the objection and exception of the defendant to the giving of the aforementioned instruction. The court there said:

"The argument advanced is that if an accused sets up a false and fabricated defense he may be convicted under such an instruction as this, even though there is absolutely no evidence before the jury tending to show his guilt; and that the instruction as given was in effect a direction to the jury to convict the defendant if it found that his defense was false and fabricated. We think that the instruction ought not to be so understood and that it is not susceptible of the construction. The words of the instruction are that if the defense is found to be false and fabricated it 'forms the basis of a presumption' against the defendant and that 'such action' is 'the basis of a presumption of guilt.' This means, and was doubtless intended

to mean, even if the instruction is read as though standing alone, that the jury may regard the intentional false defense as justifying a presumption of guilt. There is certainly no express direction in the instruction that the jury must convict if it finds that the defense was fabricated. There is no express direction that the jury *must* draw a presumption of guilt if the defense is fabricated. It is merely told that the presentation of such a defense forms the basis of, that is, justifies, a presumption of guilt. It is just as though the instruction in the last sentence had read: 'You *may* draw' a presumption of guilt. The jury was not told, 'You take a presumption of guilt' or 'You draw a presumption of guilt.' The direction was instead, 'You take or regard such action as the basis or foundation or justification of a presumption of guilt.' "

Territory v. Wong, supra, at pp. 827-828.

In addition thereto, the Supreme Court of the Territory of Hawaii from time to time has seen fit to follow and reaffirm the rulings made in the foregoing cases.

Territory v. Young, 32 Haw. 628, 658 (1933).
Territory v. Abellana, 38 Haw. 533, 544-548 (1950).

The opinions sustaining the validity of such an instruction is not necessarily or by any means confined to the decisions of the Hawaiian tribunal. Such is evident from the opinions of cases decided in other jurisdictions. In fact, the leading case, if not the most authoritative, is a federal case and not Hawaiian. *Allen*

v. United States decided on December 7, 1896 and reported in 164 U.S. 492, is the case, and it is the underlying authority upon which the Hawaiian cases find support and weight as such.

In the case of *Allen v. United States, supra,* wherein the defendant was tried three times and on the third trial was convicted of murder, one of the rulings assigned as error by the defendant was the giving of the following instruction:

> "You will understand that your first duty in the case is to reject all evidence that you may find to be false; all evidence that you may find to be fabricated, because it is worthless, and if it is purposely and intentionally invoked by the defendant it is evidence against him; it is the basis for a presumption against him, because the law says that he who resorts to perjury to accomplish an end, this is against him and you may take such action as the basis of a presumption of guilt."

In sustaining the ruling of the Circuit Court of the United States for the Western District of Arkansas, the Supreme Court of the United States, through Justice Brown said:

> "There was certainly no error in instructing the jury to disregard evidence that was found to be false; and the further charge that false testimony, knowingly and purposely invoked by defendant, might be used against him, is but another method of stating the principle that the fabrication of testimony raises a presumption against the party guilty of such practice."

Though the cases cited hereinafter do not involve the validity of any instruction such as the one now under consideration, they are in accord with the general principle of law upon which the legality of the instruction is established.

Lindsey v. U.S., 264 F 94 (1920).
Waller v. U.S., 179 F 810 (1910).
Wilson v. U.S., 162 U.S. 613, 40 L. Ed. 1090, 16 Sup. Ct. 895 (1896).
Commonwealth v. Spezzaro, 250 Mass. 454, 146 N.E. 3 (1925).
People v. Arnold, 43 Mich. 303, 5 N.W. 385 (1880)
Commonwealth v. Devaney, 182 Mass. 33, 64 N.E. 402 (1902).

The case of *Bollenbach v. United States*, 326 U.S. 607, 66 S. Ct. 402, 90 L. Ed. 350, cited by the appellant on page 51 of his brief is not an authority which concerns this case. In the *Bollenbach case*, the Supreme Court of the United States was faced with the problem of determining the legality of a following instruction:

> "Of course if it occurred afterwards it would not make him guilty, but in that connection I say to you that if the possession was shortly after the bonds were stolen, after the theft, it is sufficient to justify the conclusion by you jurors of knowledge by the possessor that the property was stolen. And, just a moment—I further charge you that possession of stolen property in another state than that in which it was stolen shortly after the theft raises a presumption that the possessor was a thief and transported stolen property in interstate commerce, and that such presumption

is subject to explanation and must be considered with all the testimony in the case."

It held that the above instruction constituted a prejudicial error in that it was misleading to the jury. Be that as it may, the case did not decide on any issue material to the case at bar and for that reason is inapplicable.

As to the contention advanced by the appellant on page 51 of his brief that if the defendant sets up a false defense, such conduct has the effect of converting the presumption of innocence to presumption of guilt and that the defendant's guilt would be determined by his false defense, see *Territory v. Wong, Supra,* on pages 827-828, where the court faced with the identical type of instruction said:

> "The argument advanced is that if an accused sets up a false and fabricated defense he may be cnvicted under such an instruction as this, even though there is absolutely no evidence before the jury tending to show his guilt; and that the instruction as given was in effect a direction to the jury to convict the defendant if it found that his defense was false and fabricated. We think that the instruction ought not to be so understood and that it is not susceptible of that construction. The words of the instruction are that if the defense is found to be false and fabricated it 'forms the basis of a persumption' against the defendant and that 'such action' is 'the basis of a presumption of guilt.' This means, and was doubtless intended to mean, even if the instruction is read as though standing alone, that the jury may regard the in-

tentional false defense as justifying a presumption of guilt. There is certainly no express direction in the instruction that the jury must convict if it finds that the defense was fabricated. There is no express direction that the jury must draw a presumption of guilt if the defense is fabricated. It is merely told that the presentation of such a defense forms the basis of, that is, justifies, a presumption of guilt. It is just as though the instruction in the last sentence had read: 'You *may* draw' a presumption of guilt. The jury was not told, 'You take a presumption of guilt' or 'you draw a presumption of guilt.' The direction was instead, 'you take or regard such action as the basis or foundation or justification of a presumption of guilt.' "

The other argument of the appellant that the presumption of guilt is not compatible with due process of law in the light of the pervading rule of presumption of innocence in criminal cases is not tenable.

The presumption of innocence, according to the famous textbook writers and authoritative treatises, means nothing more than to say that in criminal cases the burden of proof rests with the prosecution to adduce evidence and convince the jury of defendant's guilt.

See: *Wigmore on Evidence, Vol. IX, Sec. 2511, p. 407, (3rd Ed. 1940).*
Wharton's Criminal Evidence, Vol. I, Sec. 72, pp. 85-88 (11th Ed. 1935).
Underhill's Criminal Evidence, Chap. VI, Sec. 50, p. 45 (3rd Ed. 1923).

And Professor Thayer in his famous lecture on the Presumption of Innocence in Criminal Cases, which is generally recognized as the best treatment of the subject extant, and in which the rule announced in *Coffin v. United States,* 156 U.S. 432, 39 L. Ed. 481, 15 Sup. Ct. Rep. 394, is analyzed and utterly refuted, says:

> "Now, what does the presumption of innocence mean? Does it need not be proved; and as to the matter mean anything more than a particular application of that general rule of sense and convenience, running through all the law, that men in general are taken, prima facie—i. e., in the absence of evidence to the contrary—to be good, honest, free from blame, presumed to do their duty in every situation in life, so that no one need go forward, whether in pleading or proof, to show as regards himself or another that the fact is so but everyone shall have it presumed in his favor? If it does, what is its meaning? And after tracing the history of the presumption, he continues: 'It is important to observe this, because, by a loose habit of speech, the presumption is occasionally said to be itself evidence, and juries are told to put it in the scale and weigh it. Greenleaf, in a single phrase in the first volume of his treatise on Evidence (34), a phrase copied occasionally into cases and text-books, has said: 'This legal presumption of innocence is to be regarded by the jury in every case as matter of evidence, to the benefit of which the party is entitled.' This statement is condemned by the editor of the last edition of Greenleaf's book; and in Taylor on Evidence, the great English handbook, which followed Greenleaf's text closely, this passage is

omitted, and always has been omitted. In the latter part of Greenleaf's Evidence (vol. 3), which deals specifically with criminal cases, it does not appear. It is denied also by Chamberlayne, the careful editor of the works on Evidence of Best and Taylor. What can such a statement as this mean,—that the presumption is to be regarded as evidence? Is it meant that, on grounds of natural presumption or inference, innocence is ordinarily found in criminal cases? As to that, if one would see the true operation of natural inference and natural presumption in criminal cases, and would appreciate how entirely artificial, how purely a matter of policy the whole rule is which bids a jury on the trial to assume innocence, let him turn his attention to the action of courts at other stages than the trial.' And after proceeding to show that, after indictment found, the law presumes the defendant guilty for the purpose of determining whether bail shall be granted and in fixing the amount thereof, and for all other purposes except that of having a fair and impartial trial before a petit jury, he proceeds: 'The effect of the presumption of innocence, so far from being that of furnishing to the jury evidence,—i. e., probative matter, the basis of an inference,—is rather the contrary. It takes possession of this fact, innocence, as not now needing evidence, as already established prima facie, and says: 'Take that for granted. Let him who denies it go forward with his evidence.' And he concludes as follows: 'A presumption itself contributes no evidence, and has no probative quality. It is sometimes said that the presumption will tip the scale when the evidence is balanced. But, in truth, nothing tips the scale but evidence, and a pre-

sumption—being a legal rule or a legal conclusion —is not evidence. It may represent and spring from certain evidential facts; and these facts may be put in the scale. But that is not putting in the presumption itself. A presumption may be called 'an instrument of proof,' in the sense that it determines from whom evidence shall come, and it may be called something 'in the nature of evidence,' for the same reason, or it may be called a substitute for evidence, and even 'evidence,' in the sense that it counts at the outset for evidence enough to make a prima facie case. But the moment these conceptions give way to the perfectly distinct notion of evidence proper,—i. e., probative matter, which may be a basis of inference, something capable of being weighed in the scales of reason and compared and estimated with other matter of the probative sort,—so that we get to treating the presumption of innocence or any other presumption, as being evidence in this its true sense, then we have wandered into the region of shadows and phantoms.

Thayer's Preliminary Treatise on Evidence, 1898, Appx. B, p. 551."

Culpepper v. State, 4 Okl. Cr. 103, 111 Pac. 679 (1910).

"The presumption of innocence and proof of guilt must always be kept separate and distinct. The presumption of innocence is a conclusion of law in favor of the accused, whereby his innocence is not only established, but continues until sufficient evidence is introduced to overcome the proof which the law has created—namely his innocence."

See *Wharton's Criminal Evidence, Vol. I, Sec. 72, p. 87 (11th Ed. 1935).*

"The presumption of innocence is a rebuttal of presumption and it must yield to evidence. It is overcome when the accused is proven guilty beyond a reasonable doubt in a fair and impartial trial. It has been said that it may be overcome by a statutory presumption expressly making proof of certain facts prima facie evidence of another fact. The presumption is not, however, overcome by evidence of facts which are not plainly inconsistent with innocence, by mere proof that a person had an opportunity to commit the crime charged, if he was so inclined, without evidence that a crime was, in fact, committed, or by the failure of the accused to testify in his own behalf. An opinion based upon probability is wholly insufficient to overcome it.

"If evidence of alibi is offered to fortify the presumption of innocence, it must appear to a certain degree of persuasion in order to sustain the defense or raise a reasonable doubt as to the defendant's guilt; but this requirement does not take from the accused the benefit of his presumption of innocence. Even though the alibi is not established, the presumption of innocence remains and the evidence in the case may be enough to raise a reasonable doubt of guilt."

See *Wharton's Criminal Evidence, supra, at Sec. 74, p. 90-91.*

CONCLUSION

In conclusion, it is respectfully submitted that the errors assigned are without merit and the judgment appealed from should be affirmed.

Dated at Honolulu, T. H., this 24th day of May, A.D. 1951.

Respectfully submitted,

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RECEIPT of three copies of the foregoing Brief is acknowledged this.....day of May, A.D. 1951.

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Per.....

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